

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1406**

In the Matter of the Cigarette/Tobacco - Product Shop
License held by Bright Star Inc. d/b/a/ Tom and Joe's Market
for the premises located at 684 Western Avenue in St. Paul
License No. 20190003653.

**Filed May 8, 2023
Affirmed
Connolly, Judge**

St. Paul City Council
File No. RES PH 22-233

Derek Thooft, Thooft Law, LLC, Eagan, Minnesota (for relator Bright Star Inc.)

Lyndsey M. Olson, St. Paul City Attorney, Therese A. Skarda, Assistant City Attorney, St.
Paul, Minnesota (for respondent City of St. Paul)

Considered and decided by Connolly, Presiding Judge; Bratvold, Judge; and Kirk,
Judge.*

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

On certiorari appeal from a decision by respondent-city to revoke relator's
cigarette/tobacco license, relator argues that the city acted arbitrarily and capriciously. We
affirm.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

FACTS

Husham Alko Al Furajiji is the owner of relator Bright Star Inc. d/b/a Tom and Joe's Market (Bright Star), which operates a convenience store located in St. Paul. Respondent City of St. Paul (city) issued Bright Star a license to sell cigarette/tobacco products. But the license does not permit Bright Star to sell flavored tobacco products or other flavored products.¹ Such products require a tobacco shop license, which is issued only to stores that sell almost exclusively tobacco products and do not allow people under the age of 21 years to enter.

When issuing tobacco licenses, the city educates the licensees regarding the products they are permitted to sell. The licensees are also advised by the city of changes to tobacco-related laws through mailings, outreach from city inspectors during inspections, and other education programs. When ordinances change, the city mails the new ordinances to the licensees.

In January 2022, inspectors conducted an inspection of Bright Star's store in response to a complaint alleging that flavored tobacco products were being sold out of a jacket in the store. During the inspection, flavored tobacco products were discovered in the drawers beneath the cash register counter. Flavored tobacco products were also discovered in a couch behind the cash register that has a storage compartment under the couch cushion. In addition, more than 20 packs of menthol cigarettes were discovered in a jacket hanging on the wall, some of which did not have Minnesota tax stamps affixed to them. And there was a large

¹ Flavored tobacco products are items such as menthol cigarettes, and flavored products include cannabidiol (CBD) gummy candies and Delta-8 vaping products.

amount of flavored product, such as Delta-8, Delta-10, and CBD in the form of vaping cartridges and pens, on display throughout the store.

On March 22, 2022, the city sent Bright Star a notice of violation and recommended penalty. The notice stated that, under the St. Paul Legislative Code, the presumptive penalty for a first-time violation of possessing or selling flavored products is a ten-day license suspension. But the notice stated that the St. Paul Department of Safety and Inspections (the department) was recommending an upward departure from the presumed penalty because of the amount of product discovered in the store and because of the “blatant, intentional nature of the violations and the total disregard for ordinances.” Thus, the department recommended a 24-month revocation of Bright Star’s license.

Bright Star requested a contested-case hearing before an administrative law judge (ALJ). At the hearing, evidence was presented that Bright Star had one prior, unrelated violation from March 2020, which involved a failed youth tobacco compliance test. The city also presented two witnesses at the hearing: (1) a city licensing manager, who testified regarding licensing of tobacco and flavored products and the reason for the proposed upward departure; and (2) one of the inspectors who inspected Bright Star’s store, who testified that she found both a substantial amount of hidden flavored products, and numerous flavored products on display. And the city presented numerous pictures displaying the products found during the inspection of the store.

Bright Star did not dispute that flavored tobacco products and flavored products were in the store. But Bright Star argued that its license should not be revoked because the store financially supports the owner, his immediate family, and members of his extended family.

Bright Star also argued that there was no evidence that the products were being sold because the inspector did not purchase any products and observed no sales being made. Bright Star argued further that the ordinances regarding what products may be sold are confusing and change frequently. And Bright Star disputed that the flavored tobacco product was hidden, claiming that the products were in the process of being returned to the vendor.

The ALJ did not find credible the owner of Bright Star's claim that the flavored tobacco products were not being sold and, instead, were in the process of being returned to the vendor. The ALJ then determined that the city had "substantial reason to upwardly depart to revocation because of [Bright Star's] intentional illegal conduct, as evidenced by [the] concealment of the violative products. That is, [Bright Star's] conduct evidences an intention to violate the terms of [its] license, rather than an inadvertent or unintentional selling of a violative product." The ALJ also determined that the "upward departure is warranted by the substantial amount of flavored tobacco products found concealed in [Bright Star's] store since each product constitutes a separate violation." Thus, the ALJ recommended revoking Bright Star's license because the city had met his burden to show that it may take adverse action against Bright Star's license and that there was a basis for departing upwardly from the presumptive penalty.

A public hearing was held before the St. Paul City Council in September 2022 to resolve the proposed recommendation to revoke Bright Star's license. Following the hearing, the city adopted the recommendation of the ALJ and revoked Bright Star's license. By writ of certiorari, Bright Star now challenges the city's decision.

DECISION

“Generally, decisions of administrative agencies, including cities, enjoy a presumption of correctness and will be reversed only when they reflect an error of law or where the findings are arbitrary, capricious, or unsupported by substantial evidence.” *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 562 (Minn. App. 2001), *rev. denied* (Minn. Nov. 13, 2001). An appellate court’s “authority to interfere in the management of municipal affairs is, and should be, limited and sparingly invoked.” *White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 175 (Minn. 1982); *see Big Lake Ass’n v. St. Louis Cnty. Planning Comm’n*, 761 N.W.2d 487, 491 (Minn. 2009) (“Our limited and deferential review of a quasi-judicial decision is rooted in separation of powers principles.”). “As a reviewing court, we will not retry facts or make credibility determinations, and we will uphold the decision if the lower tribunal furnished any legal and substantial basis for the action taken.” *Staehele v. City of St. Paul*, 732 N.W.2d 298, 303 (Minn. App. 2007) (quotation omitted).

The St. Paul Legislative Code prohibits the sale of flavored products without an applicable license. St. Paul, Minn., Legislative Code (SPLC) § 324.07(j) (2023). The presumptive penalty for a first violation is a ten-day license suspension. SPLC § 324.10(b) (2023). The presumptive penalty for a second violation is revocation of the license. *Id.* Although the presumptive penalties are “presumed to be appropriate for every case, . . . the [city] may deviate therefrom in an individual case where the [city] finds and determines that there exist substantial and compelling reasons which make it appropriate to do so.” *Id.* § 324.10(a) (2023).

Bright Star argues that the city’s decision to depart upwardly from the presumptive penalty in this case was arbitrary and capricious. A decision is arbitrary and capricious when the city

(a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency’s expertise.

In re Schmalz, 945 N.W.2d 46, 54 (Minn. 2020) (quotation omitted). A city’s decision is “arbitrary and capricious when it represents the [city’s] will and not its judgment.” *Id.* (quotation omitted). When there is more than one option, a city’s choice of one course of action over another is not arbitrary or capricious. *CUP Foods*, 633 N.W.2d at 562. “[T]he burden is on [relator] to demonstrate the arbitrariness of the council’s action.” *Country Liquors, Inc. v. City Council*, 264 N.W.2d 821, 824 (Minn. 1978).

Bright Star argues that the city “failed to consider an important aspect of the problem[:] that of which being the steps taken by [Bright Star] that were implemented right after the [department’s] complaint.” The steps Bright Star claims it took after receiving the complaint consist of “preparing policies and procedures, meeting with staff to walk through city ordinances to outline what is expected of the business and staff, letting go of the staff that were involved in this incident, and . . . walking through the vendor contracts to specifically detail products that are against city ordinances.” Bright Star contends that, because the city “overlooked” these steps, the city’s decision is arbitrary and capricious.

We are not persuaded. There is nothing in the record indicating that the city “overlooked” the steps taken by Bright Star. Instead, the record reflects that the city

council heard the steps taken by Bright Star after the complaint was issued. In fact, one of the councilmembers specifically commented on Bright Star firing some of its employees after the inspection and asked if Bright Star was blaming the employees for the violation. The city council then granted the motion “to lay over for a week” to “get a little extra time” to consider the “complex” case before ultimately deciding to revoke Bright Star’s license. The fact that the city did not rule in Bright Star’s favor does not mean that Bright Star’s arguments were “overlooked” or not considered. *See CUP Foods*, 633 N.W.2d at 562 (stating that a decision is not arbitrary and capricious when there is more than one option, and an agency chooses one course of action over another).

Bright Star also contends that the decision is arbitrary and capricious because the city “overlooked another important aspect of the problem, the contradictory nature of the . . . Ordinance, the role that plays in the distribution of tobacco by the tobacco industry in the metro area, and the role the distributor played in this violation.” We disagree. The fact that distributors may sell flavored tobacco products to other establishments does not excuse Bright Star’s conduct. As the city points out, the record reflects that Bright Star received training on tobacco products, which supports the conclusion that Bright Star understood that penalties may be imposed for selling prohibited products.

Finally, Bright Star cites two nonprecedential decisions to support its position, arguing that the city’s decision is arbitrary and capricious because the facts supporting the revocations in the nonprecedential cases were more egregious than the conduct at issue in this case. But we are not bound by nonprecedential decisions. *See Minn. R. Civ. App. P. 136.01, subd. 1(c)* (“Nonprecedential opinions . . . are not binding authority except as law

of the case, res judicata, or collateral estoppel”). Moreover, although the circumstances presented in other nonprecedential cases were arguably more serious than the circumstances presented here, the city determined that the circumstances presented in this case constituted substantial and compelling reasons warranting a departure. These circumstances consist of a large amount of flavored product discovered in Bright Star’s store, some of which Bright Star attempted to conceal by storing it in a jacket, in a drawer under the cash register, and in a compartment in a couch behind the cash register. In reaching its decision, the city explained that revocation of Bright Star’s license was the appropriate remedy based on the facts of the case, and Bright Star’s disagreement with the decision does not make the decision arbitrary and capricious. *See CUP Foods*, 633 N.W.2d at 562. Accordingly, Bright Star has not shown that the city’s decision was arbitrary and capricious.

Affirmed.